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7
8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA
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| 11 RIVERS CUOMO, an individual; PAT WILSON, |) No. TAC 21-01 |
| an individual; BRIAN BELL, an individual; |) |
| 12 and MIKEY WELSH, an individual; |) |
| collectively and professionally known as |) |
| 13 "WEEZER" |) |
| |) |
| 14 Petitioners, |) |
| |) |
| 15 vs. |) |
| |) |
| 16 ATLAS/THIRD RAIL MANAGEMENT, INC., a |) DETERMINATION OF |
| California corporation; and PAT MAGNARELLA, |) CONTROVERSY |
| 17 an individual, |) |
| |) |
| 18 Respondents. |) |
| |) |

19
20 The above-captioned matter, a petition to determine
21 controversy under Labor Code §1700.44, came on regularly for
22 hearing on October 31, 2001 in Los Angeles, California, before
23 the Labor Commissioner's undersigned hearing officer.
24 Petitioners were represented by Stanton L. Stein and Yakub
25 Hazzard, and Respondents were represented by Martin D. Singer and
26 Paul N. Sorrell. Based on the evidence presented at this hearing
27 and on the other papers on file in this mater, the Labor
28 Commissioner hereby adopts the following decision.

1 FINDINGS OF FACT

2 1. Petitioners are musicians who perform under the names
3 "Weezer" and, on certain occasions, "Goat Punishment". Weezer
4 was formed in 1992. Starting in 1998 through 2000, Weezer
5 performed under the name Goat Punishment on seven or eight
6 separate occasions, generally when the musicians wanted to play
7 before a relatively small audience of knowledgeable fans, without
8 the pressure of performing under their more-widely known name.

9 2. In late 1993, petitioners hired Roven Cavallo
10 Entertainment, Inc., to provide "personal management" services.
11 This agreement was later set out in a written contract, which was
12 executed around January 1, 1994. Under the terms of this
13 contract, petitioners agreed to pay commissions to their personal
14 manager in the amount of 15% of their gross earnings. The
15 contract specified that Roven Cavallo Entertainment was not a
16 licensed talent agency and is not licensed, permitted or
17 authorized to attempt, offer or promise to procure employment for
18 petitioners. The contract also provided that "in the event of
19 litigation or arbitration arising out of this agreement or the
20 relationship of the parties created hereby, the prevailing party
21 shall be entitled to recover any and all reasonable attorney's
22 fees and other costs incurred in connection herewith."

23 3. At some point between 1994 and 2001, the corporate name
24 of Roven Cavallo Entertainment was changed to Atlas/Third Rail
25 Management, Inc. Respondent Atlas/Third Rail Management,
26 (hereinafter "Atlas") continued to represent petitioners as their
27 personal manager until May 2001. Respondent Pat Magnarella
28 testified that he is a "partner" at Atlas. Neither Atlas nor

1 Maganrella has ever been licensed as a talent agent.

2 4. From 1995 until May or June 2001, petitioners were
3 represented by Creative Artists Agency as their booking/talent
4 agents. Prior to 1995, William Morris Agency served as
5 petitioners' booking/talent agents.

6 5. Weezer's first record was released on May 1994.
7 Petitioner Rivers Cuomo testified that as the date for the
8 release approached, he expressed his frustration to Pat
9 Magnarella that no record release party had been scheduled.
10 According to Cuomo, Magnarella said that he'd get the band a
11 record release party/show, "and then the show was booked."
12 Weezer performed at this show, which took place at Club Lingerie
13 on May 9, 1994, and which, like any other live performance, was
14 open to the public. Magnarella testified that he had no role in
15 obtaining that engagement, and that he believed that it had been
16 booked by William Morris Agency, Weezer's booking/talent agent at
17 that time. Petitioners failed to present any evidence to rebut
18 Magnarella's testimony on this issue.

19 6. In October or November 2000, Magnarella asked Rivers
20 Cuomo whether petitioners would be interested in performing as
21 actors in the movie "Scooby Doo", which was scheduled to be
22 filmed in January or February 2001. Cuomo testified that
23 Magnarella sent copies of the movie script to the petitioners.
24 Magnarella testified that the film was being produced by Atlas,
25 and that along with managing musicians, Atlas/Third Rail also
26 produces movies. Rivers ultimately advised Magnarella that
27 petitioners were not interested in appearing in this film.

28 7. In November 2000, petitioners agreed to perform at the

1 KROQ Acoustic Christmas shows, scheduled for December 16, and
2 December 17, 2000. Petitioners wanted to do some live
3 performances before these shows, under the name "Goat
4 Punishment", in order to "warm up" for the Christmas shows.
5 Rather than contact their booking agents at Creative Artists
6 Agency to obtain engagements for these "warm up" performances,
7 petitioners contacted Christopher Donahoe, an Atlas employee who
8 had been working as an assistant to Pat Magnarella since December
9 1998, to arrange for these performances. Among his duties as an
10 Atlas employee, Donahoe was responsible for setting up rehearsals
11 for musicians. Previously, Donahoe had set up rehearsals for
12 Weezer both without any audience and with non-paying private
13 audiences of record company executives. Donahoe was not licensed
14 as a talent agent, and prior to November 2000, had never sought
15 to procure live public engagements for petitioners.

16 8. On or about December 1, 2000, Donahoe made telephone
17 calls to Jennifer Teft, the booker at a music club called
18 "Spaceland", and Paul McGuigan, the booker at a music club called
19 "The Troubadour", seeking to procure engagements for Weezer to
20 perform before live, paying audiences under the name "Goat
21 Punishment" immediately prior to petitioners' scheduled
22 engagement at the KROQ Christmas shows. As a result of
23 Donahoe's calls, both venues booked petitioners to perform -- on
24 December 14, 2000 at Spaceland, and on December 15, 2000 at the
25 Troubadour. In a subsequent telephone discussion with Jennifer
26 Teft, on December 7, 2000, Donahoe negotiated the financial terms
27 of petitioners' Spaceland appearance, agreeing to a \$500
28 guarantee plus a percentage of the gate. Patrons were charged an

1 admission fee for that show, and petitioners received \$900
2 compensation for the performance. Donahoe did not negotiate any
3 terms of compensation for petitioners' appearance at the
4 Troubadour, however, petitioners were paid \$250 for that
5 appearance. Goat Punishment was one of four musical groups
6 performing on the bill at the Troubadour, and members of the
7 audience had to pay an admission fee. The show was advertised in
8 the LA Weekly.

9 9. Petitioners' booking/talent agency at the time, Creative
10 Artists Agency, played no role whatsoever in procuring or
11 negotiating the terms of the Spaceland and Troubadour
12 performances. Creative Artists Agency never booked any of
13 petitioners' performances under the name "Goat Punishment."

14 10. Atlas never received any compensation for itself as a
15 result of any of any of petitioners' Goat Punishment shows.
16 Atlas did not seek to collect any commissions for these shows.

17 11. During the one-year period prior to the filing of this
18 petition to determine controversy, petitioners paid a total of
19 \$134,011.13 (\$55,655.59 prior to December 1, 2000, and \$78,355.54
20 on or after that date) in commissions to Atlas as follows:
21 Weezer collectively paid \$96,490.99 (\$48,191.74 before, and
22 \$48,299.25 on or after 12/1/00), Rivers Cuomo paid \$35,206.75
23 (\$7,353.84 before, and \$27,852.91 on or after 12/1/00), Pat
24 Wilson paid \$2,190.74 (\$65.39 before, and \$2,125.35 on or after
25 12/1/00), and Brian Bell paid \$122.65 (\$44.62 before, and \$78.03
26 on or after 12/1/00).

27 12. Respondent Pat Magnarella testified it was not until
28 October 2001 that he learned that Donahoe had obtained the

1 December 2000 engagements at Spaceland and the Troubadour.
2 However, there was no indication from the testimony presented
3 that Magnarella had ever instructed Donahoe that he could not
4 procure live public engagements for petitioners.

5 13. In May 2001, petitioners sought to reduce Atlas'
6 commission rate. Magnarella refused to reduce Atlas' rate, and
7 petitioners thereafter terminated the personal management
8 agreement. Atlas filed a demand for arbitration against
9 petitioners pursuant to the arbitration clause in the personal
10 management agreement. Thereafter, Atlas filed a superior court
11 action seeking writs of attachment against petitioners.
12 Petitioners responded with this petition to determine
13 controversy, filed with the Labor Commissioner on July 20, 2001.
14 By this petition, petitioners seek an order declaring the
15 personal management contract void *ab initio* on the ground that
16 respondents performed functions of a talent agency without a
17 license therefor, reimbursement of all amounts paid to
18 respondents pursuant to the personal management contract in the
19 one year period preceding the filing of the petition, and
20 reimbursement of attorney's fees incurred in connection with this
21 proceeding.

22 LEGAL ANALYSIS

23 Petitioners are artists within the meaning of Labor Code
24 section 1700.4(b). The issue here is whether Respondents
25 functioned as a "talent agency" within the meaning of Labor Code
26 §1700.4(a), and if so, what consequences should flow from the
27 fact that Respondents were not licensed by the Labor Commissioner
28 as a talent agency.

1 Labor Code section 1700.4(a) defines "talent agency" as "a
2 person or corporation who engages in the occupation of procuring,
3 offering, promising, or attempting to procure employment or
4 engagements for an artist or artists." Labor Code §1700.5
5 provides that "[n]o person shall engage in or carry on the
6 occupation of a talent agency without first procuring a license .
7 . . from the Labor Commissioner."

8 The Talent Agencies Act is a remedial statute; its purpose
9 is to protect artists seeking professional employment from the
10 abuses of talent agencies. For that reason, the overwhelming
11 judicial authority supports the Labor Commissioner's historic
12 enforcement policy, and holds that "[E]ven the incidental or
13 occasional provision of such [procurement] services requires
14 licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51.

15 Petitioners allege four separate acts of procurement or
16 offers to procure employment. The first, the May 9, 1994 record
17 release party at Club Lingerie, fails for lack of evidence that
18 the engagement had been procured by Atlas. The second,
19 Magnarella's offer to employ petitioners for acting roles in the
20 movie "Scooby Doo", fails because as a matter of law, this offer
21 of employment does not constitute procurement within the meaning
22 of Labor Code §1700.4(a), in that Atlas was the producer of this
23 movie. We have previously held that a person or entity who
24 employs an artist does not "procure employment" for the artist,
25 within the meaning of section 1700.4(a), by directly engaging the
26 services of the artist; and that the activity of procuring
27 employment under the Talent Agencies Act refers to the role an
28 agent plays when acting as an intermediary between the artist

1 whom the agent represents and a third-party employer. See *Chinn*
2 *v. Tobin* (TAC No. 17-96) pp. 5-8. Likewise, a movie producer
3 does not act as a talent agent by offering to directly employ
4 artists to act in the movie that the producer is producing.

5 The third and fourth instances of alleged procurement -- the
6 engagements at Spaceland and the Troubadour in December 2000 --
7 are more troubling. These were musical performances before a
8 live paying audience that were advertised and open to the public.
9 The fact that petitioners performed these engagements under the
10 name "Goat Punishment" rather than the name "Weezer" is entirely
11 irrelevant, as is the fact that Atlas did not collect or seek to
12 collect any commissions for these shows. (See *Park v. Deftones*
13 (1999) 71 Cal.App.4th 1465, 1471-1472, holding that the Talent
14 Agencies Act requires a license to engage in procurement
15 activities even if no commission is received for the service.)
16 Respondents' argument that there was no procurement of employment
17 because there was no attempt to secure payment for petitioners
18 for their artistic services is equally unavailing, as it ignores
19 the evidence that Donahoe negotiated with Spaceland for
20 compensation for petitioners. Even assuming, arguendo, that
21 Donahoe did not negotiate the amount of compensation for that
22 engagement, the fact remains that petitioners were paid for both
23 the Spaceland and Troubadour engagements, and thus, this case has
24 nothing in common with the securing of a pay-to-play engagement
25 (under which the artist pays for the right to perform) discussed
26 in *Bloomberg v. Butler* (TAC No. 31-94).

27 An agreement that violates the licensing requirement of the
28 Talent Agencies Act is illegal and unenforceable. "Since the

1 clear object of the Act is to prevent improper persons from
2 becoming [talent agents] and to regulate such activity for the
3 protection of the public, a contract between an unlicensed
4 [agent] and an artist is void." *Buchwald v. Superior Court*
5 (1967) 254 Cal.App.2d 347, 351. Having determined that a person
6 or business entity procured, promised or attempted to procure
7 employment for an artist without the requisite talent agency
8 license, "the [Labor] Commissioner may declare the contract
9 [between the unlicensed agent and the artist] void and
10 unenforceable as involving the services of an unlicensed person
11 in violation of the Act." *Styne v. Stevens, supra*, 26 Cal.4th at
12 55. "[A]n agreement that violates the licensing requirement is
13 illegal and unenforceable" *Waisbren v. Peppercorn*
14 *Productions, Inc.* (1995) 41 Cal.App.4th 246, 262. Moreover, the
15 artist that is party to such an agreement may seek disgorgement
16 of amounts paid pursuant to the agreement, and "may . . . [be]
17 entitle[d] . . . to restitution of all fees paid the agent."
18 *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of
19 restitution is, of course, subject to the one year limitations
20 period set out at Labor Code §1700.44(c). This is a remedy that
21 petitioners seek herein.

22 Respondents contend, however, that no liability should
23 attach for the acts of procuring engagements at Spaceland and the
24 Troubadour because Christopher Donahoe, the Atlas employee who
25 procured these engagements for petitioners, was not authorized by
26 Atlas or Magnarella to do so. This raises the issue of whether
27 Atlas, as Donahoe's employer, is strictly liable for the
28 consequences that might otherwise stem from unlawful procurement

1 activities undertaken by an employee of Atlas, or whether some
2 other standard of liability should apply.

3 Initially, we note that definitions of key terms in the
4 Talent Agencies Act suggest that the Legislature intended to make
5 business entities that perform the functions of a talent agency
6 (whether legally under a license, or unlawfully without a
7 license) strictly liable for the acts of their employees. The
8 term "talent agency" is defined as "a person or corporation who
9 engages in the occupation of procuring...." Labor Code
10 §1700.4(a). The prohibition of functioning as a talent agency
11 without a license provides that "[n]o person shall engage in . .
12 . ." Labor Code §1700.5. The term person, as used throughout
13 the Talent Agencies Act, is defined as "any individual, company,
14 society, firm, partnership, association, **corporation**, limited
15 liability company, manager, **or their agents or employees.**" Labor
16 Code §1700. By expressly including "agents or employees" within
17 this definition, it would appear that a corporation cannot escape
18 liability for the misdeeds of any of its employees.

19 We further note that there is nothing in the Act, or in any
20 of the case law construing the Act, that would suggest any
21 standard other than strict liability for violations of an
22 artist's rights under the Act. Any weaker standard of liability
23 would tend to impede the remedial purposes of the Act. Standards
24 under which an employer may escape liability for the unauthorized
25 acts of its employee -- for example, liability based on common
26 law theories of agency or the doctrine of *respondeat superior* --
27 are more applicable in dealing with an innocent employer's
28 liability for a tort committed by the employer's employee against

1 a third party towards whom the employer owes no statutory duty.
2 This model is inappropriate here because the artist enjoys the
3 protections of a comprehensive statutory scheme designed to
4 regulate the conduct of those persons or business entities who
5 provide employment procurement services. Common law doctrines of
6 liability would leave artists unprotected from unlawful conduct
7 and would fail to adequately discourage the sorts of practices
8 that are prohibited by the Act. For these reasons, we conclude
9 that Atlas is liable for the consequences of the unlawful
10 procurement activities of its employee, regardless of whether
11 these activities were authorized.

12 This approach is consistent with that of the United States
13 Supreme Court in assessing the liability of an employer under the
14 National Labor Relations Act for unfair labor practices committed
15 by low level supervisors or lead persons when the employer had
16 neither authorized nor ratified the unlawful conduct. See *I.A.*
17 *of M. v. Labor Board* (1940) 311 U.S. 72, 61 S.Ct. 83, and *H.J.*
18 *Heinz Co. v. Labor Board* (1941) 311 U.S. 514, 61 S.Ct. 320. This
19 is also the approach followed by the California Supreme Court in
20 addressing this same question under the Agricultural Labor
21 Relations Act. "[I]n general an employer's responsibility for
22 coercive acts of others under the ALRA, as under the NLRA, is not
23 limited by technical agency doctrines or strict principles of
24 respondeat superior, but rather must be determined, as *I.A. of M.*
25 *and Heinz* suggest, with reference to the broad purposes of the
26 underlying statutory scheme." *Vista Verde Farms v. ALRB* (1981)
27 29 Cal.3d 307, 322.

28 Even under a standard of liability based on *respondeat*

1 superior, we find that under the facts herein, Atlas would not
2 escape liability for Donahoe's unlawful procurement activities.
3 Under the doctrine of *respondeat superior*, the innocent employer
4 is vicariously liable for its employees' torts committed while
5 acting within the scope of employment, without regard to whether
6 the employee is acting in excess of his authority or contrary to
7 instructions. The employee is considered to be acting within the
8 scope of his employment if he is engaged in work he was employed
9 to perform, during his working hours. The employer can be liable
10 for his employee's unauthorized intentional torts committed
11 within the scope of his employment despite lack of benefit to the
12 employer. *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d
13 962. At the time the engagements at issue here were procured,
14 Donahoe had been employed by Atlas for one year, and among his
15 other duties as an employee of Atlas, he was responsible for
16 setting up rehearsals for the petitioners. Viewing the
17 engagements as "rehearsals" for the upcoming KROQ Christmas show
18 (as Atlas itself argues), the procurement of these engagements
19 came within the scope of Donahoe's employment. As such,
20 liability attaches to Atlas under the doctrine of *respondeat*
21 *superior*.

22 On the other hand, the facts do not support a finding of
23 liability as to respondent Magnarella. There is no evidence that
24 he personally engaged in any unlawful procurement activities.
25 Petitioners' contract was with the corporate predecessor to
26 Atlas, not with Magnarella individually. Petitioners paid
27 commissions to Atlas, not to Magnarella. Atlas itself is a
28 corporation, and there was no evidence presented that would

1 warrant the imposition of personal liability for amounts that may
2 be owed by Atlas.

3 Having found that Atlas, through its employee Christopher
4 Donahoe engaged in unlawful procurement activities, and that
5 Atlas is responsible for the unlawful procurement activities, we
6 necessarily conclude that the contract between Atlas and
7 petitioners is void, and that Atlas has no enforceable rights
8 thereunder. Under the facts herein, the contract cannot be held
9 to have been void *ab initio*, in that at the time the parties
10 entered into this contract, it was not a subterfuge for the
11 unlicensed performance of employment procurement services.
12 Indeed, for a period of seven years, Atlas (and its predecessor,
13 Roven Cavallo Entertainment) functioned as personal managers for
14 petitioners, not as talent agents, operating within the letter of
15 the law. Throughout this seven year period of time, the contract
16 to perform personal management services was valid and
17 enforceable. The contract became invalid, and void (or, more
18 accurately, voidable by petitioners) once Atlas, through its
19 employee, Christopher Donahoe, started functioning as a talent
20 agency within the meaning of the Act by performing employment
21 procurement services for the petitioners.

22 As for disgorgement of commissions previously paid to Atlas,
23 we note that in *Bank of America NTSA v. Fleming* (No. 1098 ASC MP-
24 432), the Labor Commissioner held that in a proceeding under the
25 Talent Agencies Act, the Commissioner has broad discretion in
26 fashioning a remedy that is appropriate under the facts of the
27 case. Under the facts of this case, where we find that the
28 contract was not void *ab initio*, but rather, became void once

1 Atlas engaged in unlawful procurement activities on December 1,
2 2000, it would be inappropriate to order disgorgement of any
3 amounts that petitioners paid to Atlas prior to December 1, 2000.
4 Disgorgement is an appropriate remedy, however, as to amounts
5 paid to Atlas pursuant to the personal management contract
6 starting on December 1, 2000.

7 Turning to petitioner's request for attorneys' fees incurred
8 in connection with this proceeding, the contract between the
9 parties did provide for an award of reasonable attorney's fees to
10 the prevailing party "in the event of litigation or arbitration
11 arising out of this agreement or the relationship of the parties
12 created hereby." But an administrative proceeding before the
13 Labor Commissioner pursuant to Labor Code §1700.44 neither
14 constitutes "litigation" nor "arbitration". Litigation is
15 commonly understood as "the act or process of carrying out a
16 lawsuit." (Webster's New World Dictionary, Third College Edition
17 (1988)) Lawsuits take place in courts, not before administrative
18 agencies. Black's Law Dictionary defines "litigation" as a
19 "contest in a court of justice for the purpose of enforcing a
20 right." And an "arbitration", obviously, takes place before an
21 arbitrator, not an administrative agency authorized to hear
22 disputes pursuant to statute. Consequently, we conclude that the
23 contract does not provide for an award of attorneys' fees
24 incurred in a proceeding to determine controversy before the
25 Labor Commissioner. Therefore, even though the petitioners have
26 prevailed before the Labor Commissioner, they are not entitled to
27 attorneys' fees.

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1. The personal management contract between petitioners and Atlas/Third Rail Management, Inc., became void and unenforceable on December 1, 2000, and Atlas now has no enforceable rights thereunder;
2. Atlas reimburse petitioners for the commissions paid to Atlas from December 1, 2000 in the amount of \$78,355.54, consisting of \$48,299.25 to Weezer collectively, \$27,852.91 to Rivers Cuomo, \$2,125.35 to Pat Wilson, and \$78.03 to Brian Bell;
3. The petition is dismissed as to respondent Pat Magnarella;
4. All parties shall bear their own costs and attorney's fees.

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

ARTHUR S. LUJAN
State Labor Commissioner